Filed 11/23/09 Vo v. Mitsathaphone CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHEILA KIEU VO, Plaintiff and Respondent, v. SANDITA MITSATHAPHONE, Defendant and Appellant.	F056245 (Super. Ct. No. S-1500-CV-260974) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

McCormick, Barstow, Sheppard, Wayte & Carruth, Todd W. Baxter and Scott M. Reddie for Defendant and Appellant.

Angelo & Di Monda and Joseph Di Monda for Plaintiff and Respondent.

-ooOoo-

Plaintiff suffered injuries to her neck and back in a single vehicle automobile accident. In her action against the driver of the vehicle, she was awarded $1,747,801.30 in damages. Defendant appeals, contending plaintiff presented no substantial evidence to

support the award of certain categories of damages. We agree that plaintiff failed to present any evidence of the reasonable value of her past medical care and modify the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

On February 2, 2007, defendant, Sandita Mitsathaphone, drove her car from San Diego to Fresno, so she could leave it with her parents there for repairs. Plaintiff, Sheila Vo, who was 17 and not licensed to drive, went along to keep defendant company. After arriving in Fresno, defendant borrowed a car from Gabriel Pacheco[1] for the return trip. About midnight that night, plaintiff and defendant began the trip back to San Diego. About 2:00 a.m., defendant lost control of the car; it spun a few times and hit a fence and a tree. Plaintiff was taken by ambulance to Kern Medical Center. She was later transferred by helicopter to the University of California San Diego (UCSD) Medical Center, where she underwent two surgeries for a cervical injury and a fracture in her thoracolumbar spine.

At trial, the deposition of Dr. Yu-Po Lee, plaintiff's treating physician, was read to the jury. The trial moved more quickly than anticipated and neither party's medical expert was available when the court required them to testify. Instead, the deposition testimony of plaintiff's expert, Dr. Ronald Schilling, and defendant's expert, Dr. Peter Wile, was read to the jury. The jury found in favor of plaintiff, and awarded her damages as follows: $297,801.31 for past economic loss; $700,000 for future economic loss; and $750,000 for past and future noneconomic damages.

Defendant appeals, asserting there was no substantial evidence supporting the award. She contends the award of past economic damages, which consisted of her past

---

1 Plaintiff sued both Sandita Mitsathaphone, the driver, and Gabriel Pacheco, the owner of the vehicle involved in the accident. Although judgment was entered against both defendants, only Mitsathaphone appealed. Consequently, we use the term "defendant" herein to refer only to Mitsathaphone.

medical costs, is unsupported because plaintiff presented no evidence of the reasonable value of the medical services rendered. Additionally, she contends there was no evidence demonstrating plaintiff is reasonably certain to incur or suffer the future economic and noneconomic damages, and there was no evidence of the reasonable value of any future medical care.

DISCUSSION

I. Substantial Evidence Review

Defendant's appeal challenges the sufficiency of the evidence to support the verdict rendered by the jury. Defendant contends there was no substantial evidence presented at trial to support the awards of past economic damages, future economic damages, and future noneconomic damages. In response, plaintiff argues that there was sufficient evidence to support the awards in the testimony of the medical witnesses. With respect to the future noneconomic damages, she argues defendant is actually claiming the damages were excessive, a motion for new trial is a prerequisite to such a claim, defendant did not make a timely motion for new trial, and therefore defendant cannot prevail in her challenge to these damages. After the briefs were filed, plaintiff filed a motion to dismiss defendant's appeal, asserting defendant was appealing from the denial of her motion for new trial and, because that motion was not timely, the trial court had no jurisdiction to grant it and "there is no trial court order which this Court may correct or reverse." Plaintiff asserts the appeal is moot and should be dismissed.

Ordinarily, errors are not waived on appeal by failure to make a motion for new trial. (*Estate of Barber* (1957) 49 Cal.2d 112, 118-119.) There is an exception: the failure to move for a new trial generally precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate. (*Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 789.) This exception, however, applies only when the party's challenge to the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions. (*County of Los Angeles v. Southern Cal.*

Edison Co. (2003) 112 Cal.App.4th 1108, 1121.) "The failure to move for a new trial, however, does not preclude a party from urging legal errors in the trial of the damage issue such as erroneous rulings on admissibility of evidence, errors in jury instructions, or failure to apply the proper legal measure of damages." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.)

Defendant does not challenge the damage award on the ground it is excessive. Rather, she challenges the sufficiency of the evidence to support some types of damages included in the award. Specifically, she contends plaintiff failed to present any evidence to prove the reasonable value of her past medical care or the reasonable value and certainty of her future damages. Her challenge does not require a factual inquiry dependent on jury issues, such as the credibility of witnesses or resolution of conflicts in the evidence. The issue is a legal one: whether there was substantial evidence to establish that plaintiff was entitled to recover certain categories of damages. Accordingly, a motion for new trial was not a prerequisite to her appeal.

In any event, as plaintiff concedes, defendant filed a timely notice of intention to move for new trial. Notice of entry of judgment was served on July 25, 2008. Defendant's notice of intention to move for new trial was served on August 7 and filed on August 8, 2008, within the 15-day period allowed by Code of Civil Procedure section 659. Plaintiff complains that defendant's memorandum of points and authorities in support of the motion was not filed within 10 days after the filing of the notice of intention to move for new trial, as required by California Rules of Court, rule 3.1600(a). The timely filing of a memorandum of points and authorities is not a jurisdictional prerequisite to a motion for new trial; the motion may be granted even in the absence of a memorandum. (*Phillips v. Barron* (1958) 158 Cal.App.2d 316, 319-320; see also, Cal. Rules of Court, rule 3.1600(b), providing that the court *may* deny a motion for new trial if the memorandum is not timely filed.) Consequently, plaintiff's motion to dismiss is without merit, and is denied.

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Substantial evidence is evidence of ponderable legal significance, that is reasonable, credible and of solid value. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id*. at 652.)

II. Past Medical Expenses

"[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640.) Proof of the cost of medical treatment and hospitalization alone is insufficient. "It must be shown additionally that the services were attributable to the accident, that they were necessary and that the charges for such services were reasonable." (*Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 81-82.) A bill is evidence of the cost of the service, and evidence that the bill was paid is some evidence that the amount was reasonable. (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 73.) Alternatively, expert testimony may be used to establish the reasonable value of the medical care rendered. (*Citron v. Fields* (1938) 30 Cal.App.2d 51, 57.)

Defendant contends there was insufficient evidence to support the award of past economic damages, which consisted of plaintiff's past medical expenses. She contends the document summarizing plaintiff's medical bills should not have been admitted and

there was no evidence that the amounts plaintiff was billed for her medical services were reasonable.

A. Exhibit No. 4

Defendant contends the trial court abused its discretion by admitting in evidence exhibit No. 4, which was a list of four items of past medical expense allegedly incurred by plaintiff.[2] Defendant asserts on appeal that exhibit No. 4 should have been excluded because it was hearsay and was not authenticated. Defendant failed to raise these objections at trial, and they have not been preserved for appeal. (Evid. Code, § 353; *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1226, fn. 13.)

Defendant also contends exhibit No. 4 should have been excluded because it was relevant only if the charges it listed were reasonable amounts for the services rendered; because there was no evidence of the reasonableness of the charges, she argues the list was irrelevant. Plaintiff contends defendant waived any objection to admission of exhibit No. 4, because counsel stipulated to the amounts it contained. Defense counsel, however, merely stipulated that exhibit No. 4 accurately summarized the bills plaintiff received from the medical providers listed, and plaintiff did not have to call the custodians of records to lay the foundation for admissibility of the bills. He did not stipulate that the amounts listed reflected necessary treatment or reasonable charges for such treatment.

The medical bills were admissible to establish the costs charged by the providers for the medical services rendered. Here, in lieu of introducing the actual bills with attendant authentication evidence, the parties stipulated that the summary introduced as exhibit No. 4 accurately summarized the amounts charged in those bills. Further evidence was required to establish that the services provided were attributable to the

---

[2] The list contained the following charges: Hall Ambulance Service, $25,217; Kern Medical Center, $27,434.11; UCSD Medical Center, $241,599.20; and physical therapy, $3,551. The total was $297,801.31, the exact amount the jury awarded for past economic damages.

accident and reasonably necessary, and that the amounts charged for the services were reasonable. A failure to produce any evidence demonstrating that the amounts charged were reasonable would not make the medical bills or a summary of the medical bills inadmissible. Rather, it would mean that plaintiff failed to carry her burden of proving her past medical expenses as damages. Consequently, we reject defendant's challenge to the admissibility of exhibit No. 4.

B. Substantial evidence

Defendant asserts that substantial evidence does not support the award of damages for past medical expenses, because of plaintiff's failure to introduce any evidence that the amounts billed were reasonable. The testimony of plaintiff's mother, Heather Truong, included estimates of the amounts of plaintiff's medical bills. The amounts varied significantly from those reflected in exhibit No. 4.[3] Truong did not testify that the bills had been paid. The testimony of Dr. Lee and Dr. Schilling did not include any testimony that the amounts charged in the medical bills were reasonable for the services rendered. Dr. Lee stated he did not know the full amount of his fees or those of UCSD Medical Center and Dr. Schilling addressed only the costs of plaintiff's future care. While defendant's expert, Dr. Wile, conceded that the *treatment* plaintiff received from the various providers was reasonable and necessary, when asked whether the *amounts charged* for that treatment were reasonable and necessary, he responded that hospitals tend to overcharge patients who pay, to make up for patients who do not pay, and some of the charges were not reasonable.

Plaintiff bore the burden of proving that the medical services for which she sought recovery were attributable to the accident and necessary, and that the charges for those

---

[3] Truong testified to the following amounts: Hall Ambulance Service approximately $25,000; Kern Medical Center approximately $267,000; UCSD Medical Center approximately $441,000; and physical therapy approximately $3,500-$4,000.

services were reasonable. No evidence was presented to show that the amounts charged to plaintiff for her care were reasonable. Consequently, the award of damages for past medical expenses was not supported by substantial evidence and the judgment must be modified to eliminate that award.

III. Future Damages

Damages may be awarded for detriment reasonably certain to result in the future. (Civ. Code, § 3283; *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 97-98.) The jury awarded plaintiff $700,000 for future economic damages and $750,000 for past and future noneconomic damages. Defendant contends the awards for future economic and noneconomic damages are not supported by substantial evidence, because there was no evidence that plaintiff was reasonably certain to incur expenses for medical treatment or other services or to sustain noneconomic injuries in the future. Additionally, she asserts there was no evidence of the reasonable cost of any anticipated future care.

A. Future economic damages

Defendant contends there was no evidence that any future medical care is reasonably certain to be needed. She asserts Dr. Schilling only testified to possible future medical needs and expenses, without indicating they were reasonably certain to occur.

"While there is no clearly established definition of 'reasonable certainty,' evidence of future detriment has been held sufficient based on expert medical opinion which considered the plaintiff's particular circumstances and the expert's experience with similar cases." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995, disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664.) It is not necessary that the medical expert testify plaintiff is "reasonably certain" to be disabled in the future. "All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty." (*Mendoza v. Rudolf* (1956) 140 Cal.App.2d 633, 637.) "In examining the sufficiency of

the evidence to support an award of damages, it is not required that we be able to precisely recreate the jury's reasoning. [Citation.] We will uphold a verdict if it is within the range of possibilities supported by any of the testimony. [Citation.]" (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 532.)

Dr. Lee performed a cervical C5-6 diskectomy and fusion after the accident. He testified that a November 2007 MRI indicated plaintiff was experiencing some degeneration at the C4-5 and C6-7 levels, which was an early sign of arthritis. He opined the degeneration would continue to progress and there was at least a 20 percent chance that, within the next 10 years, plaintiff would require surgery at the C4-5 level; the chance would increase as her age increases. The second surgery was at the L1 level. Dr. Lee stated there was a 20 percent chance plaintiff would require treatment for adjacent segment degeneration at the L2-3 level within 10 years, but the treatment would not include an operation if it could be avoided. Instead, he would recommend physical therapy, acupuncture, chiropractic care, over-the-counter medications, and traction.

Plaintiff's expert, Dr. Schilling, testified concerning plaintiff's future medical care. He testified he expects plaintiff will need at least two cervical surgeries, above and below the vertebrae fused by Dr. Lee, as those areas experience greater stress as a result of the fusion. He stated he also expects she will have significant lumbar problems, which he included in the amount he allocated for future surgeries. He opined that plaintiff will need a home attendant in the future, to help with housekeeping because she cannot lift or bend. He anticipated her physical condition will decline over the next 30 years and, "with as much certainty as I could say, by the time she reaches 50, she's going to need somebody on a daily basis to help her clean her house," get in and out of a bathtub, and do similar things.

Defendant's expert, Dr. Wile, conceded it was likely plaintiff "will have some symptoms requiring medical management indefinitely." He explained medical management included "[m]edication, ice, heat, occasional physical therapy."

"As a rule, the physician whose opinion is most reliable is loath to give an opinion as to what consequences will or will not follow as a result of an injury in a certain case, but at the same time willing, as here, to state the result of his own professional experience and observations in treating cases where like injuries have occurred, and as a result of that experience say that we might or might not expect like results to follow in this case." (*Cordiner v. Los Angeles Traction Co.* (1907) 5 Cal.App. 400, 404.) It is for the jury to determine from the testimony whether future injuries or detriment are so reasonably certain to occur that damages should be awarded for them. (*Bauman v. San Francisco* (1940) 42 Cal.App.2d 144, 165.)

Awards of future damages have been upheld where plaintiff's expert testified it was "reasonable to assume" plaintiff would have trouble with the injured parts of his body in the future, but he did not know how much, and he thought the changes in plaintiff's body would "build up as age takes place and he is apt to have some trouble" (*Ostertag v. Bethlehem Shipbuilding Corp.* (1944) 65 Cal.App.2d 795, 805-806); where plaintiff was still experiencing pain two years after the accident and a doctor testified, "'Frequently in this type of neck injury a patient will continue to have symptoms indefinitely' and 'It may last forever; it may become as he gets older, it may get worse; he may improve somewhat. After two years, presenting limited motion and pain, as I say, the prognosis is serious'" (*Guerra v. Balestrieri* (1954) 127 Cal.App.2d 511, 518-519); and where plaintiff's treating physician testified plaintiff was "very likely" to have some permanent damage and "we might get" traumatic epilepsy as a result of her skull fracture, "but nobody knows, except for time, and time will only tell what will come here" (*Riggs v. Gasser Motors* (1937) 22 Cal.App.2d 636, 643, italics omitted).

Dr. Schilling testified that he "expects" plaintiff to need three surgeries in the future, and "with as much certainty as [he] could say" will need a home attendant to assist her with her daily activities at least after she reaches age 50. This testimony, combined with plaintiff's testimony as to her continuing pain, and the other medical

testimony concerning plaintiff's current condition and the potential for future surgeries or other treatment, constitutes substantial evidence from which the jury could reasonably conclude plaintiff is reasonably certain to require medical treatment or incur other economic costs in the future as a result of the injuries she suffered in the accident.

Defendant contends plaintiff presented no evidence of the reasonableness of the amounts claimed or awarded for future economic damages. "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.]" (*GHK Associates v. Mayer Group, Inc*. (1990) 224 Cal.App.3d 856, 873.)

"'[A] reasonably approximate estimation is deemed to be sufficient, and the existence of a satisfactory method of achieving this estimation will preclude the defendant, whose wrongful act gave rise to the plaintiff's injury, from complaining that the amount of future damages cannot be determined with mathematical precision.'" (*Southern California Disinfecting Co. v. Lomkin* (1960) 183 Cal.App.2d 431, 450.)

Dr. Schilling testified that plaintiff's attorney asked him to see plaintiff, review the medical records, and "produce a life care plan outlining her future expenses based on the accident and the expected consequences of the accident." He examined plaintiff, reviewed the medical reports, and produced two reports, one of which contained "the actual numbers, what it's going to cost" for her future treatment. Dr. Schilling's reports were not admitted as evidence, but he was asked about some of the numbers reflected in his report, and explained them. For example, he testified that the $200,000 he allotted for future surgeries was "not enough" for two cervical surgeries and one lumbar surgery, plus the post operative physical therapy. Thus, Dr. Schilling testified to his estimates of the actual costs of the future care he anticipated plaintiff would need, based on his examination of plaintiff, his review of her medical records, and his own past experience. Although Dr. Schilling did not expressly state that the amounts he testified to were "reasonable" amounts for plaintiff's anticipated future care, we believe his testimony constitutes evidence of a "reasonably approximate estimation" of the actual costs of her

future care, which supplied the evidence of reasonableness defendant contends was lacking. Consequently, we reject defendant's argument that the award of future economic damages fails because plaintiff failed to present substantial evidence of the reasonable cost of her future care.

B. Future noneconomic damages

The jury awarded plaintiff $750,000 for past and future noneconomic damages. Defendant contends the award for future noneconomic damages is not supported by substantial evidence, because there was no evidence regarding what medical treatment plaintiff was reasonably certain to need or what detriment she was reasonably certain to sustain in the future.

"To preserve for appeal a challenge to separate components of a plaintiff's damage award, a defendant must request a special verdict form that segregates the elements of damages. [Citations.] The reason for this rule is simple. Without a special verdict separating the various damage components, 'we have no way of determining what portion—if any' of an award was attributable to a particular category of damages challenged on appeal. [Citation.]" (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158.) The special verdict in this case provided for separate awards for past economic damages and future economic damages; it provided for a combined award of past and future noneconomic damages. The parties agreed upon the verdict form; defendant did not object to it or propose a form that separated past from future noneconomic damages. As a result, we cannot determine how much of the $750,000 award was for future noneconomic damages. By failing to request a special verdict form that segregated the future noneconomic damages from other elements of damages, defendant forfeited the right to challenge the award of those damages. (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053.)

In any event, there was sufficient evidence to support an award of future noneconomic damages. Noneconomic damages may be recovered for such injuries as

physical pain, fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror and ordeal. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893.) In *Mendoza v. Rudolf, supra,* 140 Cal.App.2d 633, defendants contended the award of damages for future pain and suffering was not supported by substantial evidence. The court noted: "'It was not required that the doctor testify that he was reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. [Citations.]'" (*Id*. at p. 637.) It concluded expert medical testimony was not required to support the award of damages for pain and suffering. (*Ibid*.) The evidence indicated that, at the time of trial, one plaintiff was still suffering from memory loss, dizzy spells, shooting pains in his back, and discomfort due to a kidney injury, and the other was suffering from headaches, dizzy spells, and vision problems. (*Id*. at pp. 636-637.) The court found this evidence sufficient to support the award for future pain and suffering.

Plaintiff testified to her continuing headaches and lower back pain; she testified to taking pain medication regularly. She has permanent scars as a result of her surgeries; she cannot lift more than 20 pounds. She is unable to engage in many activities, including going to amusement parks and giving her cousins piggy back rides. Before the accident, she had been interning at a child care facility with elementary school children. After the accident, she wanted to continue her internship with infants, but her teacher would not allow it because plaintiff might need to pick the infants up. After the accident plaintiff had a job at Robeks Juice for two months; she was not able to take the oranges out of the box and put them in the juicer, so she resigned by agreement with her supervisor because she could not do the job. Dr. Lee testified that an MRI done in November 2007 indicated plaintiff was exhibiting some early signs of arthritis at one surgery site, which he believed would continue to progress. Dr. Wile anticipated plaintiff

would experience headaches and neck and back pain indefinitely. Substantial evidence supports the award of future noneconomic damages.

DISPOSITION

The judgment is modified by striking the award of $297,801.31 for past economic loss. As so modified, the judgment is affirmed. The parties will bear their own costs on appeal.

_____
HILL, J.

WE CONCUR:

_____
WISEMAN, Acting P.J.

_____
CORNELL, J.